UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 10-00169-WES
	:	
RUSSELL YATES	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) and 18 U.S.C. § 3401(i) for proposed findings of fact concerning whether Defendant is in violation of the terms of his supervised release and, if so, to recommend a disposition of this matter. In compliance with that directive and in accordance with 18 U.S.C. § 3583(e) and Fed. R. Crim. P. 32.1, a revocation hearing was held on August 2, 10 and 17, 2018. The Government presented two witnesses and fifteen exhibits. Defendant presented one exhibit and three witnesses. After considering the evidence presented at that hearing, I recommend that the Court find Defendant guilty on Violation Numbers 1 and 3 and not guilty on Violation Number 2.

Background

On May 16, 2018, the Probation Office petitioned the Court for the issuance of an arrest warrant. On that date, the District Court reviewed the request and ordered the issuance of a warrant. Defendant was presented in this Court on July 25, 2018 for an initial appearance pursuant to the warrant.

On August 2, 10 and 17, 2018, a hearing was held on the following contested charges:

> **Violation No. 1: While on supervision, Defendant shall not commit another federal, state or local crime.**

On April 28, 2018, Defendant assaulted his girlfriend as evidence by her text messages sent to Probation Officer Dufresne on April 29, 2018 and April 30, 2018, as well as the Pawtucket Police Report dated April 30, 2018.

Violation No. 2: While on supervision, Defendant shall not commit another federal, state or local crime.

On or about April 29, 2018, Defendant stole $3,000.00 from his girlfriend's dresser as evidenced by her text messages sent to Probation Officer Dufresne on April 29, 2018 and April 30, 2018, as well as the Pawtucket Police Report dated April 30, 2018.

Violation No. 3: Defendant shall not leave the Judicial District without permission of the Court or the Probation Officer.

On or about April 28, 2018, Defendant was at Foxwoods Casino in Ledyard, Connecticut as evidenced by the Pawtucket Police Report dated April 30, 2018. Defendant did not have the permission of the Court or the Probation Officer to leave the Judicial District.

After considering the evidence presented, I recommend that the Court find Defendant guilty of Violation Nos. 1 and 3 and not guilty of Violation No. 2.

Recommended Disposition

Title 18 U.S.C. § 3583(e)(2) provides that if the Court finds that Defendant violated a condition of supervised release, the court may extend the term of supervised release if less than the maximum term was previously imposed. The maximum term of supervised release was previously imposed and therefore the term cannot be extended.

Title 18 U.S.C. § 3583(e)(3) provides that the Court may revoke a term of supervised release and require the Defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision, if the Court finds by a preponderance of evidence that the defendant has violated a condition of supervised release, except that a defendant whose

term is revoked under this paragraph may not be sentenced to a term beyond 5 years if the instant offense was a Class A felony, 3 years for a Class B felony, 2 years for a Class C or D felony, or 1 year for a Class E felony or a misdemeanor. Defendant was on supervision for Class C felonies. Therefore, he may not be required to serve more than two years' imprisonment upon revocation.

Title 18 U.S.C. § 3583(h) and § 7B1.3(g)(2) provide that when a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized, the Court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. The authorized statutory maximum term of supervised release is three years. There has been a total of three months' imprisonment previously imposed for violations of supervised release. Therefore, the Court may impose the above-noted statutory maximum, minus the three months previously imposed, minus the term of imprisonment that is to be imposed for this revocation.

Section 7B1.1 provides for three grades of violations (A, B, and C). Subsection (b) states that where there is more than one violation, or the violation includes more than one offense, the grade of violation is determined by the violation having the most serious grade.

Section 7B1.1(a) provides that a Grade A violation constitutes conduct which is punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device, or (B) any other offense punishable by a term of imprisonment exceeding twenty years. Grade B violations are conduct constituting any other offense punishable by a term of imprisonment exceeding one year.

Grade C violations are conduct constituting an offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.

Section 7B1.3(a)(1) states that upon finding of a Grade A or B violation, the Court shall revoke supervision. Subsection (a)(2) states that upon finding of a Grade C violation, the Court may revoke, extend, or modify the conditions of supervision. Defendant has committed a Grade B violation. Therefore, the Court shall revoke supervision.

Pursuant to § 7B1.3(d), any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of confinement or detention may be converted to an equivalent period of imprisonment. There is no outstanding restitution, fine, community confinement, home detention or intermittent confinement.

Section 7B1.4(a) provides that the Criminal History Category is the category applicable at the time the defendant was originally sentenced. Defendant had a Criminal History Category of V at the time of sentencing.

Should the Court revoke supervised release, the Revocation Table provided for in § 7B1.4(a) provides the applicable imprisonment range. Defendant committed a Grade B violation and has a Criminal History Category of V. Therefore, the applicable range of imprisonment for this violation is eighteen to twenty-four months.

Should the Court find that Defendant has committed a Grade B or C violation, § 7B1.3(c)(1) states that where the minimum term of imprisonment determined under § 7B1.4 is at least one month, but not more than six months, the minimum term may be satisfied by (A) a sentence of

imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term.

Should the Court find that the defendant has committed a Grade B or C violation, §7B1.3(c)(2) states that where the minimum term of imprisonment determined under § 7B1.4 is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (b) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment. Neither of these provisions apply to this matter.

Section 7B1.5(b) provides that, upon revocation of supervised release, no credit shall be given toward any term of imprisonment ordered, for time previously served on post-release supervision.

Discussion

It is undisputed that the Government bears the burden of proving these violation charges by a preponderance of the evidence. United States v. Portalla, 985 F.2d 621, 622 (1st Cir. 1993). It is also undisputed that the exclusionary rule is inapplicable in supervised release violation proceedings. United States v. Jimenez-Torres, CR No. 06-135-(PG), 2010 WL 2650318 at *4 (D.P.R. June 30, 2010); and United States v. Gravina, 906 F. Supp. 50, 55 (D. Mass. 1995). Finally, it is undisputed that hearsay evidence can be admissible in a supervised release revocation hearing subject to certain findings by the Court. See Fed. R. Evid. 1101(d)(3); Portalla, 985 F.2d at 622 (holding that the "tests of admissibility set forth in the Federal Rules of Evidence" are not applicable in revocation hearings but that evidence that does not satisfy those rules "must

nonetheless be reliable"); see also United States v. Lowenstein, 108 F.3d 80, 83 (6th Cir. 1997) (supervised release violation finding may rest upon reliable hearsay).

After considering all of the evidence presented, I conclude that the Government has met its burden of proof as to Violation Nos. 1 (assault) and 3 (leaving the District without permission) but not as to Violation No. 2 (larceny). I explained the reasons for my findings in open court after hearing closing arguments on August 17, 2018, and incorporate by reference my explanation on the record into this Report and Recommendation. In a nutshell, I found the twenty-one year old victim's testimony that Defendant introduced her to prostitution and was acting as her pimp when he left the District with her to travel to Foxwoods Casino to be credible. I also found her testimony that Defendant assaulted her and abandoned her at Foxwoods Casino on the evening of April 28, 2018 to be credible. Finally, I found that Defendant presented a false alibi witness in his defense and that her testimony was not credible in most material respects. As to Violation No. 2 (larceny), I found that the Government did not present sufficient direct evidence of the ownership of the money in issue or Defendant's misappropriation and possession of such funds to sustain a violation finding.

As to sentence, this is a Grade B violation and the guideline range is eighteen to twenty-four months. The Government argues that Defendant's assault of the young woman and his conduct in introducing her to prostitution while under this Court's supervision warrants a maximum twenty-four month sentence. (ECF Doc. No. 163). Defense counsel points to Defendant's substance abuse history and argues that "a sentence of 18 – 24 months is overly harsh and will not satisfy the need for treatment." (ECF Doc. No. 164 at p. 3). She argues for a below-guideline sentence of six months as being adequate.

This is Defendant's second violation conviction. His first violation in 2017 included charges of cocaine use, failing to attend treatment, failing to report for drug testing and cutting off

contact with Probation. (See ECF Doc. No. 139). Defendant was sentenced to three-months' incarceration and a period at the Houston House. Id.

At some point after this sentence, Defendant (age forty-six) commenced an intimate relationship with the victim (age twenty-one). He moved into her apartment and introduced her to prostitution. He acted as her pimp and left the District with her for purposes of engaging in prostitution.[1] He assaulted her in the bathroom of a hotel room in the Foxwoods Casino where she was working for him.

These facts present very little support for a below-guideline sentence. In fact, the facts and circumstances point towards a high-end sentence of twenty-four months. This is Defendant's second violation case. The Court described his first violation as "flouting of the Court's conditions." (ECF Doc. No. 139 at p. 9). That description would be a substantial understatement for this second violation. In addition to involving serious and unlawful misconduct, Defendant obstructed these proceedings by presenting a false alibi witness. The evidence of guilt as to Violation Nos. 1 and 3 is strong and a strong sentence is necessary to punish Defendant and to deter others from engaging in such behavior. Thus, I recommend a twenty-four month prison sentence for these violations with no further supervised release to follow.[2]

Conclusion

For the foregoing reasons, I recommend that the Court find Defendant guilty of violating his conditions of supervised release as charged regarding Violation Nos. 1 and 3 and not guilty of

[1] The victim testified that she was with Defendant in Worcester during the early morning hours of Saturday, April 28 for a "date" with a "client," returned to Rhode Island with Defendant around 3:00 or 4:00 in the morning to sleep, and then travelled to Foxwoods Casino with him later that afternoon to engage in "more prostitution" on Saturday evening. (See Gov't Exhs. 1-3, and ECF Doc. No. 161 at pp. 12-20, 47-48).

[2] A further effort at supervised release for this Defendant would not be an effective use of limited Probation resources. Through both his two violation cases and his unsuccessful stint with HOPE Court, Defendant has not shown any willingness to participate in good faith and take advantage of the resources available to him.

Violation No. 2 and that the Court impose a twenty-four month sentence with no further supervised release to follow.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen days of its receipt. LR Cr 57.2; Fed. R. Crim. P. 59. Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the District Court and the right to appeal the District Court's Decision. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
September 6, 2018